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## IS BRADLEY A RETRIBUTIVIST?

Thom Brooks<sup>1,2</sup>

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**Abstract:** Perhaps the least controversial area of F.H. Bradley's writings relates to his views on punishment. Commentators universally recognize Bradley's theory of punishment as a *retributivist* theory of punishment. This article challenges the received wisdom. I argue that Bradley does not endorse retributivism as commonly understood. Instead, he defends the view that punishment is non-retributivist and serves the end of societal maintenance. Moreover, Bradley defends this view consistently from *Ethical Studies* to later work on punishment. Instead of holding a theory of punishment largely unique amongst British Idealists of his time, Bradley's views on punishment are far more consistent than previously thought.

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### I

Perhaps the least controversial area of F.H. Bradley's writings relates to his views on punishment. Commentators universally recognize Bradley's theory of punishment as a *retributivist* theory of punishment.<sup>3</sup> Over his career, Bradley's most significant discussions of punishment appear in two publications: *Ethical Studies* published in 1876 and 'Some Remarks on Punishment'

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<sup>3</sup> For example, see M. Davis, 'Harm and Retribution', *Philosophy and Public Affairs*, 15 (1986), p. 236; J.P. Day, 'Retributive Punishment', *Mind*, 87 (1978), p. 499; A.C. Ewing, 'Punishment as a Moral Agency: An Attempt to Reconcile the Retributive and Utilitarian View', *Mind*, 36 (1927), pp. 293–4; D.B. Hershenov, 'Restitution and Revenge', *Journal of Philosophy*, 96 (1999), pp. 80–1; D.B. Hershenov, 'Punishing Failed Attempts Less Severely Than Successes', *Journal of Value Inquiry*, 34 (2000), p. 482; A.S. Kaufman, 'Anthony Quinton on Punishment', *Analysis*, 20 (1959), pp. 10–13; J.D. Mabbott, 'Punishment', *Mind*, 48 (1939), pp. 153–4, 157; J.D. Mabbott, 'Free-will and Punishment', in *Contemporary British Philosophy: Personal Statements*, 3rd series, ed. H.D. Lewis (London, 1956), p. 289; I. Primoratz, *Justifying Legal Punishment* (Atlantic Highland, 1989), p. 55; A.M. Quinton, 'On Punishment', *Analysis*, 14 (1953), p. 137; and L. Zaibert, *Punishment and Retribution* (Aldershot, 2006), pp. 75, 128–9. Some commentators have held more ambiguous positions on Bradley's retributivism, such as P. Johnson, 'Bradley and the Nature of Punishment', in *The Philosophy of F.H. Bradley*, ed. A. Manser and G. Stock (Oxford, 1984), pp. 99–116; J.S. Mackenzie, *A Manual of Ethics* (London, 4th edn., 1901), p. 405 n. 1 ('This is the view of punishment which appears to accord best with the origin of punishment among early peoples . . .'); Bradley offers us 'an emphatic statement of this view'; J. Rawls, 'Two Concepts of Rules', in *Collected Papers*, ed. S. Freeman (Cambridge, 1999), p. 24 n. 8; and D. Ross, *The Right and the Good* (Oxford, 1930), p. 57.

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published in an 1894 issue of the *International Journal of Ethics*.<sup>4</sup> The vast majority of commentators on Bradley's views on punishment almost exclusively consider Bradley's *Ethical Studies* rather than his later article.<sup>5</sup>

This article challenges the received wisdom. I argue that Bradley does not endorse retributivism as commonly understood. Instead, he defends the view that punishment is non-retributivist and serves the end of societal maintenance. Bradley defends this view in both his *Ethical Studies* and the later article on punishment, demonstrating the consistency of his position. Thus, his views are not uniquely retributivist amongst British Idealists. Instead, Bradley's theory of punishment is similar in important respects to competing British Idealist theories of punishment — such as the theories of T.H. Green, Bernard Bosanquet and James Seth — in finding societal maintenance to be the highest aim of legal punishment.

My argument unfolds in the following way. First, I will discuss why commentators have taken Bradley's theory of punishment presented in *Ethical Studies* to be a retributivist theory. Second, I will demonstrate why these commentators have been mistaken about Bradley's position in *Ethical Studies*. I will then conclude by arguing that Bradley's views remained the same in his later work in the *International Journal of Ethics*.

## II

The view that Bradley was a retributivist was perhaps first raised by Hastings Rashdall.<sup>6</sup> Rashdall offers two substantive points. First, he argues that Bradley offers a retributivist theory of punishment in *Ethical Studies* where we mete out 'punishment for punishment's sake' to deserving criminals.<sup>7</sup> Second, Rashdall argues that Bradley changes his views on punishment after the publication of *Ethical Studies*: 'Mr. Bradley formerly maintained that it was immoral to punish except for retribution: now he defends "social Surgery" . . .

<sup>4</sup> See F.H. Bradley, *Ethical Studies* (Oxford, 2nd edn., 1927 [1876]); and F.H. Bradley, 'Some Remarks on Punishment', *International Journal of Ethics*, 4 (1894), pp. 269–84.

<sup>5</sup> For example, only a selection from the first chapter of *Ethical Studies* is included in a special 1911 issue of the *Journal of the American Institute of Criminal Law and Criminology* on the topic of 'Anglo-American Philosophies of Penal Law' (see F.H. Bradley, 'The Philosophy of Responsibility', *Journal of the American Institute of Criminal Law and Criminology*, 2 (1911), pp. 186–98).

<sup>6</sup> See H. Rashdall, *The Theory of Good and Evil: A Treatise on Moral Philosophy*, Vol. I (Oxford, 1907), pp. 287–91, previously published as H. Rashdall, 'The Theory of Punishment', *International Journal of Ethics*, 2 (1) (1891). This was picked up by Bradley who rejected Rashdall's characterization of his theory of punishment, with a subsequent rejoinder published by Rashdall. (See Bradley, 'Some Remarks on Punishment', p. 284 n. and H. Rashdall, 'Mr. Bradley on Punishment: An Explanation', *International Journal of Ethics*, 5 (1895), pp. 241–3.)

<sup>7</sup> Rashdall, *The Theory of Good and Evil*, p. 287.

Any infliction of pain, loss, or death is justified, it appears, for an adequate social end'.<sup>8</sup> Rashdall's views on Bradley's theory of punishment are highly representative of how commentators on Bradley have universally understood his theory of punishment. In this section I will begin by demonstrating why commentators have found Bradley's theory of punishment to be a *retributivist* theory of punishment. My attention will focus only on his *Ethical Studies*. The following section will consider the question of whether or not Bradley offers a retributivist theory of punishment in *Ethical Studies* before considering whether or not Bradley changes his views on punishment.

At first glance it is easy to see why Bradley's views on punishment in his *Ethical Studies* were considered retributivist.<sup>9</sup> For example, Bradley's most well known passage on punishment is often taken as a textbook definition of retributivism. Bradley says:

Punishment is punishment, only when it is deserved. We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be.<sup>10</sup>

This position is retributivist because it holds that we can only punish those who are deserving of punishment. That is, we are forbidden from punishing criminals on account of the fact that doing so may deter potential offenders or bring about a greater common good. Instead, we punish the criminal because he or she is morally responsible for an act of wrongdoing. Thus, a criminal deserves punishment because he is responsible for wrongdoing. Our state performs 'an abominable crime' if it inflicts punishment on someone who does not deserve it.<sup>11</sup> In fact, punishing the innocent should not be considered punishment, but a crime and 'a gross immorality'.<sup>12</sup>

Bradley's *apparent* retributivism is 'negative' then, rather than 'positive', on the grounds that desert is necessary, but not sufficient, for punishment. We may only punish the guilty, but need not always punish the guilty. That is, factors beyond punishable guilt may mitigate the severity of a criminal's punishment. Bradley says:

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<sup>8</sup> *Ibid.*, p. 288 n. 1.

<sup>9</sup> It is important to note that, in the relevant passages in *Ethical Studies*, Bradley's primary focus is on responsibility and determinism rather than on offering a theory of punishment, although he discusses punishment often in the opening chapter to *Ethical Studies*. I am grateful to Bill Mander, Peter Nicholson and Bob Stern for highlighting the importance of this matter for me.

<sup>10</sup> Bradley, *Ethical Studies*, pp. 26–7.

<sup>11</sup> *Ibid.*, p. 27.

<sup>12</sup> *Ibid.*

Having once the right to punish, we may modify the punishment according to the useful and the pleasant; but these are external to the matter, they can not give us a right to punish, and nothing can do that but criminal desert.<sup>13</sup>

Therefore, we punish the guilty because they deserve punishment. However, the amount of a criminal's guilt need not be matched in value by the amount of punishment. We may well punish in pursuit of a common good beyond what might be strictly 'deserved' by an offender so long as the offender deserves to be punished in the first place. The view of 'negative' retributivism presented here (again, where desert is necessary, but not necessarily sufficient, for punishment) allows for the possibility that we need not punish the guilty if failing to punish them aids our pursuit of 'the useful and the pleasant'.<sup>14</sup> Moreover, this understanding of retributivism is opposed to 'positive' retributivism which holds that a criminal's desert is both a necessary and sufficient condition of punishment: we punish the guilty because they are guilty and without exception.<sup>15</sup>

If this picture were an accurate depiction of Bradley's theory of punishment, then it is quite clear that his theory is retributivist. Indeed, virtually all commentators universally cite Bradley as a defender of a retributivist theory of punishment on precisely the picture presented here.<sup>16</sup>

### III

The primary problem with this reading of Bradley's theory of punishment in *Ethical Studies* is that it mistakes his comments on punishment for a view of punishment that he wants to defend. Instead, when Bradley discusses the view of retributivism offered above he is presenting the views of *others* and not *his* particular position on punishment.

For Bradley, those who endorse retributivism are characterized as 'the vulgar': an unenlightened person lacking in education and intellectual insight.<sup>17</sup> In the passages cited above, Bradley argues that the view of '[p]unishment is

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Elsewhere I argue that 'positive' retributivism is no less problematic than 'negative' retributivism, although only the former is best understood as distinctively retributivist (see T. Brooks, *Punishment* (London, 2011)). On 'negative retributivism', see J.L. Mackie, 'Morality and the Retributive Emotions', *Criminal Justice Ethics* (1982), pp. 3–10.

<sup>16</sup> See Johnson, 'Bradley and the Nature of Punishment', pp. 104–5.

<sup>17</sup> See Bradley, *Ethical Studies*, pp. 2–3. The Editor of a selection of Bradley's *Ethical Studies* published in the *Journal of the American Institute of Criminal Law and Criminology* comments: '“Vulgar” in England means “ordinary” persons, not “coarse” as in America.' (See Bradley, 'The Philosophy of Responsibility', p. 186 n. 3; D. Boucher and A. Vincent, *British Idealism and Political Theory* (Edinburgh, 2000), pp. 66, 85 n. 28; and P.P. Nicholson, *The Political Philosophy of the British Idealists: Selected Studies* (Cambridge, 1990), p. 8.)

punishment, only where it is deserved' and the view that the reason why we are punished is simply 'because we owe it' are the views of the vulgar, not the views of enlightened philosophers.<sup>18</sup> Thus Bradley does not endorse the view that punishment need always be deserved and that we should punish criminals simply because they deserve punishment. Thus commentators have misled themselves in attributing retributivism to Bradley's theory of punishment in *Ethical Studies*.<sup>19</sup>

Bradley contrasts one perspective on punishment, namely, 'the vulgar', with a second perspective which he attributes to the 'Necessitarian'. The two views are presented in order to demonstrate a contrast between them. Bradley says:

For our vulgar . . . punishment is the complement of criminal desert; it is justified only so far as deserved; and further is an end in itself. For our Necessitarian, punishment is avowedly *never* an end in itself; it is *never* justifiable, except as a means to an external end.<sup>20</sup>

The vulgar defend a theory of punishment that holds that we punish the deserving on account of a criminal deserving punishment. This position is retributivist because it makes an intrinsic link between criminal responsibility for wrongdoing and justified punishment. Against retributivism, the Necessitarian — Bradley claims that John Stuart Mill is one example of a Necessitarian — argues that punishment is justified not simply because punishment might be deserved on account of criminal wrongdoing, but because punishment might help to bring about some beneficial consequence. The Necessitarian is, thus, a consequentialist who serves some particular view of legitimate ends for the state.<sup>21</sup>

The first thing we should notice in Bradley's discussion of the vulgar versus the Necessitarian is that he does not endorse the vulgar's views on punishment as presented. For example, Bradley approvingly cites a passage from Mill:

If any one thinks that there is justice in the infliction of purposeless suffering; that there is a natural affinity between the two ideas of guilt and punishment, which makes it intrinsically fitting that wherever there has been guilt, pain should be inflicted by way of punishment . . . I acknowledge that I can find no argument to justify punishment inflicted on this principle.<sup>22</sup>

<sup>18</sup> See Bradley, *Ethical Studies*, pp. 26, 28.

<sup>19</sup> This is not to say that Bradley's theory of punishment is entirely anti-retributivist, as I shall discuss in the following section.

<sup>20</sup> Bradley, *Ethical Studies*, p. 30.

<sup>21</sup> This is not necessarily a correct view of Mill's theory of punishment. My thanks to Duncan Kelly for raising this point.

<sup>22</sup> Bradley, *Ethical Studies*, p. 30. The quotation is cited as J.S. Mill, *An Examination of Sir William Hamilton's Philosophy* (London, 1865), p. 597.

It is then clearly the case that Bradley does not endorse the view that punishment is no more than a justified response to wrongdoing. Nor does Bradley defend the view that we *only* punish the guilty because they are deserving. Indeed, he says: 'Justice does not = giving to each his just deserts'.<sup>23</sup> If all retributivists hold that we can only punish the deserving, then we have sufficiently established that Bradley does not defend a retributivist theory of punishment in *Ethical Studies*. This fact is a major break from commentaries on Bradley's theory of punishment thus far.

This brings us to a second consideration with Bradley's views on punishment in *Ethical Studies*. This consideration is uncovering precisely what Bradley's views on punishment are. If Bradley is not a retributivist after all, then what position does he hold, if any?

Bradley appears to want to defend a position somewhere between retributivism and Necessitarianism.<sup>24</sup> He does not completely discard the link between guilt and punishment in favour of punishing persons purely on account of the consequentialist rewards that might be reaped by the state. Instead, his goal is to leave a space for desert, but not to grant desert a primary position. Rather, Bradley subordinates desert to societal maintenance.<sup>25</sup>

I will sketch Bradley's position here with an eye towards developing it further in the following section, where our attention will turn to his later article on punishment. It is enough to note here that Bradley states in this later article, published nearly two decades after *Ethical Studies*, that the 'retributive view pure and simple will not work'.<sup>26</sup> This view is consistent with his position in *Ethical Studies* where Bradley rejects holding a retributivist theory of punishment.

The main problem with retributivism, according to Bradley, is that we lack the ability to ascertain the moral guilt and criminal responsibility for a criminal offender. In other words, if our task is to punish people because they are 'deserving' of punishment in some sense, then it is absolutely necessary for us to determine whether or not another person is in possession of moral guilt for an act of wrongdoing. We are unable to ascertain if a person deserves punishment if we are unable to know if they possess moral guilt. This problem becomes even greater for positive retributivists who argue that desert is a necessary and sufficient condition for punishment, where punishment is not open to consequentialist considerations. Their problem is not merely that they may be unable to know another person's moral guilt, but that they need to know

<sup>23</sup> Bradley, *Ethical Studies*, p. 211 n. 2, although see also F.H. Bradley, 'Mr Sidgwick's Hedonism', in *Collected Essays*, Vol. I (Oxford, 1935), p. 120 n. 1.

<sup>24</sup> See Bradley, *Ethical Studies*, pp. 30–8.

<sup>25</sup> The specific characterization of this position as a theory of punishment as societal maintenance, rather than retributivist, preventative or rehabilitative, is offered by James Seth (see J. Seth, *A Study of Ethical Principles* (Edinburgh, 9th edn., 1907), pp. 304–5).

<sup>26</sup> Bradley, 'Some Remarks on Punishment', p. 274.



both that (a) a criminal possesses moral guilt for his crime and (b) the amount of moral guilt a criminal possesses for his crime. The first is necessary to ensure the retributivist does not punish the innocent; the second is necessary to ensure that the criminal's punishment is proportional to his crime. The problem of our inability to ascertain another's moral guilt is a problem that may fundamentally undermine all retributivist theories of punishment. Nor has this fact been lost on some retributivists.<sup>27</sup>

Bradley believes we are unable to determine at least the amount of moral guilt that another person possesses. Indeed, this is a view that he shares with other fellow British Idealist writers.<sup>28</sup> Bradley's position is that 'the principle is good, but its application is seriously embarrassed'.<sup>29</sup> That is, retributivism as such fails as a practice. However, a more modified position that is more sensitive to problems with its application might be more acceptable. For these reasons, I do not take Bradley to say that we ought to punish whomever we choose, but normally to select those that have performed a criminal act. Indeed, there is no evidence to support the view that Bradley argues contrariwise despite his many criticisms of retributivism. Nevertheless, Bradley does endorse the importance of desert for a defensible theory of punishment.

However, a final point worth noting is that Bradley prioritises societal maintenance over desert. First, Bradley tells us that who we are is a product of our place within a community: our identity is inextricably bound with the community we belong to.<sup>30</sup> Thus, Bradley says:

To know what a man is . . . you must not take him in isolation. He is one of a people, he was born in a family, he lives in a certain society, in a certain state. What he has to do depends on what his place is, what his function is, and that all comes from his station in the organism.<sup>31</sup>

*Who* we are is a product of *where* we are. The state is crucial to our identities, existing as 'the real moral idea . . . stronger than the theories and the practice of its members against it' offering us 'self-realization' in return.<sup>32</sup> Indeed, our 'highest end and law' is nothing less than 'the welfare of the community'.<sup>33</sup> It

<sup>27</sup> See T. Brooks, 'Kant's Theory of Punishment', *Utilitas*, 15 (2003), pp. 206–24.

<sup>28</sup> For example, see R.G. Collingwood, *Essays in Political Philosophy*, ed. D. Boucher (Oxford, 1995), p. 127; Mackenzie, *A Manual of Ethics*, p. 123; D.G. Ritchie, *Philosophical Studies*, ed. R. Latta (London, 1905), p. 343; and Seth, *A Study of Ethical Principles*, p. 305.

<sup>29</sup> See Bradley, 'Some Remarks on Punishment', p. 274.

<sup>30</sup> See Bradley, *Ethical Studies*, p. 166.

<sup>31</sup> *Ibid.*, p. 173. Later, Bradley argues (in 'Ideal Morality') that '[t]he content of the good self' has as its 'first and most important contribution . . . from what we have called my station and its duties'. 'The basis and foundation of the ideal self is the self which is true to my station and its duties.' (See *ibid.*, p. 220.)

<sup>32</sup> *Ibid.*, p. 201.

<sup>33</sup> Bradley, 'Some Remarks on Punishment', p. 272.



is clear that the community's welfare contributes to my individual welfare: I only possess welfare given my identity in my state.

Whilst there is no evidence in *Ethical Studies* that Bradley denies the view that we should punish lawbreakers and not innocent people, it seems equally clear that he seeks a middle position between the vulgar's endorsement of (negative) retributivism and the Necessitarian's consequentialism.<sup>34</sup> One way they might be brought together is in the following manner. We might argue that we punish in defence of societal maintenance. Our society is our highest good and punishment should be in service of this good. However, the state may only punish persons who have not broken the law in the most extreme instances where the necessity of societal maintenance hangs in the balance. Thus, we are not retributivists who hold that punishment must always be meted to the deserving and we are also not Necessitarians who claim that punishment must only be concerned with bringing about the best consequences. Instead, we claim that the primary purpose of punishment is to maintain our community as a matter of priority, normally within the limits of punishing those who break the law while being open to consequentialist considerations when determining the specific punishment.

This picture of punishment is consistent with Bradley's discussion of punishment in *Ethical Studies*. Bradley is not against normally taking a criminal's desert into account when considering whether or not to punish the criminal, so long as desert is not the primary justification of punishment. Thus, while retributivist desert may still play a role, Bradley largely rejects retributivism in *Ethical Studies*, and this contrasts with virtually all interpretations of his theory of punishment I am aware of.<sup>35</sup>

#### IV

There is a final issue we might consider. Nearly twenty years after *Ethical Studies*, Bradley published an essay entitled 'Some Remarks on Punishment'. We might wonder whether or not Bradley endorses a retributivist theory in this essay or, if he does not, whether or not he defends a more consequentialist-friendly theory of punishment based on societal maintenance in this latter essay that I have argued can also be found in his *Ethical Studies*.

The first thing we might note is that both commentators and Bradley disagree on the relationship between his *Ethical Studies* and his later work. Thus, while most commentators on Bradley's views on punishment neglect his

<sup>34</sup> In fact, not only is this position clearly defended by Bradley, it is what we might expect from a Hegelian philosopher, although I do not have the space here to present this view at greater length. (See T. Brooks, 'The Unified Theory of Punishment', in *Punishment* (London, 2011).)

<sup>35</sup> Perhaps another way of stating my claim is to say instead that Bradley's theory of punishment is not merely a retributivist theory of punishment, but much more than this and non-retributivist elements play a major and regularly overlooked part.

work beyond *Ethical Studies*, those that have not claim that Bradley's views on punishment change after *Ethical Studies*. More specifically, they argue that Bradley moves from endorsing retributivism in *Ethical Studies* to 'a primarily utilitarian theory' in his later essay, 'Some Remarks on Punishment'.<sup>36</sup> Bradley himself insisted at least one year prior to the publication of 'Some Remarks on Punishment' that his views had not changed since *Ethical Studies* nor does he claim he offers a different theory of punishment in this later work.<sup>37</sup> Remarking on his treatment of punishment in *Ethical Studies*, Bradley tells us that 'I should have little to correct in the old statement of my view except a certain number of one-sided and exaggerated expressions'.<sup>38</sup> It is clear that he denies offering any substantive changes, if offering any changes at all.<sup>39</sup>

Thus, we have already noted that most commentators are incorrect to argue that Bradley defends a retributivist theory of punishment in *Ethical Studies*. We can now ask whether Bradley's views change in his later work. My contention is that his views do not change at all.

In his later essay, Bradley retains (a) his rejection of retributivism, (b) his defence of societal maintenance, and (c) a view of punishment which holds that punishing desert is secondary to preservation of the state. I will now demonstrate each of these three points. If my reading is correct, then we can confirm that Bradley's theory of punishment is not a retributivist theory of punishment and Bradley is correct to argue that his views on punishment remain consistent across his work. I will discuss each of the three issues above in order to confirm the implications of my reading just stated.

In 'Some Remarks on Punishment', Bradley continues to reject retributivism as he had previously. He says:

There is nothing, so far as I see, but superstition and prejudice. The idea that justice is paramount, that, with the individual, gain or loss must correspond to desert, and that, without this, the Universe has somehow broken down — this popular idea is, after all, the merest prejudice. It seems to rest either on

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<sup>36</sup> This is discussed (and claimed it is an 'over-simplified' characterization) by Johnson, 'Bradley and the Nature of Punishment', pp. 103–4. Bernard Bosanquet argues that Bradley's theory of punishment is non-retributivist. (See Bernard Bosanquet, *The Philosophical Theory of the State* (London, 4th edn., 1958 [1923]), p. 207.)

<sup>37</sup> See F.H. Bradley, *Appearance and Reality* (London, 1893), p. 402 n.

<sup>38</sup> Bradley, 'Some Remarks on Punishment', p. 284 n.

<sup>39</sup> It might appear that I am making a logical flaw, attributing later ideas to an earlier work. However, I would argue first that these later ideas are fully consistent with Bradley's earlier work. Second, Bradley himself argues that there is no inconsistency between his earlier and later discussions. Therefore, I do not believe there is any such flaw. My thanks to an anonymous referee for pushing me on this point.

the assumption that there is no principle above justice, or on the common error as to the absolute validity of principles.<sup>40</sup>

Bradley argues that punishment need not always be linked with moral guilt: the fact that someone may be deserving of punishment is not itself a reason to punish that person. Instead, we might choose to punish a person on different grounds. Retributivists who argue for the necessity of desert for any legitimate imposition of punishment are here said to defend a 'superstition' and 'prejudice', nothing more.

Bradley clearly defends a non-retributivist justification for legitimate punishment. For example, he says later in the essay:

I find . . . no difficulty in the increase or diminution of the penalty by considerations other than those of desert. But, since the welfare of the state is used in punishment as the criterion of desert, I would remark that such increase or diminution may be less than is imagined.<sup>41</sup>

Bradley does not deny the fact that we *might* decide to employ desert in determining whether to punish a criminal, as well as determining how severely we should punish a criminal. Instead, he simply rejects desert as an absolute standard we must apply in each and every case of determining whether to punish and how much we should punish. Thus, he has no difficulty with using standards other than desert, although this view does not entail that we never employ desert as a standard.

Instead of retributivist desert, Bradley suggests that societal maintenance, or 'the welfare of the state', serves as our *primary* end in punishing. Bradley is even more explicit on this point than in his earlier work: 'The moral supremacy of the community, its unrestricted right to deal with its members, is the sole basis on which rational punishment can rest.'<sup>42</sup> Recall that earlier we saw that, for Bradley, when we defend and uphold our community's welfare we at the same time promote and maintain the welfare of the community's individuals. The primary justification of punishment is just as much about societal maintenance in his later work as before. Punishment is not justified solely because it is deserved or because of good consequences, as such; but, rather, punishment is justified because it brings about the specifically good consequence of societal maintenance.

In sum, we should always have an eye towards 'the general good' of our community when we determine criminal sentences.<sup>43</sup> Bradley's views echo

<sup>40</sup> Bradley, 'Some Remarks on Punishment', p. 277.

<sup>41</sup> *Ibid.*, p. 284 n.

<sup>42</sup> *Ibid.*, pp. 272–3. See P. Nicholson, 'Bradley as a Political Philosopher', in *The Philosophy of F.H. Bradley*, ed. A. Manser and G. Stock (Oxford, 1984), pp. 125–7; and Nicholson, *The Political Philosophy of the British Idealists*, p. 25.

<sup>43</sup> See Bradley, 'Some Remarks on Punishment', p. 274.

both Hobbes's claim that the state is our 'Mortall God' on earth,<sup>44</sup> as well as Hegel's claim of the state is 'the march of God in the world'<sup>45</sup> when Bradley says:

The welfare of the community is the end and is the ultimate standard. And over its members the right of the moral organism is absolute. Its duty and its right is to dispose of these members as seems to it best. Its right and duty is, in brief, to be a Providence to itself.<sup>46</sup>

The promotion of the welfare of the community contributes to the welfare of individuals, but when the two come into conflict the welfare of the community takes priority. Thus far, it is clear that Bradley continues to reject retributivism and that he defends a theory of social maintenance.

The final issue we must discuss is whether Bradley continues to defend a hybrid theory of punishment that states that punishment need not always be deserved, but that desert may often be an important consideration even if it is subordinate to the necessity of societal maintenance. Indeed, we find that Bradley's views on this subject remain the same in his later work. For one thing, he notes the subordinate status of moral guilt. He says: 'We have not, indeed, given up the idea of retribution and desert, but we have made it secondary and subject to the chief end of the general welfare.'<sup>47</sup> Thus, desert *may* be a consideration for us although it is *not necessarily* always a consideration. It is not an absolute condition for just punishment. In fact, punishment may take many forms in the promotion of societal maintenance. Bradley notes: 'The educational, the deterrent, and the retributive view may each retain, we may rather presume, a certain value.'<sup>48</sup> This view of punishment is remarkably similar to that of other British Idealists, demonstrating that Bradley's position is not an aberration amongst the British Idealist tradition.<sup>49</sup>

A final question on this last issue concerns the punishment of the innocent. If desert is not a necessary condition of all justified punishment, then we might worry that Bradley would justify the punishment of innocent people. Bradley appears to confirm our worry. He says:

To remove the innocent is unjust, but it is not, perhaps, therefore in all cases wrong. Their removal, on the contrary, will be right if the general welfare

<sup>44</sup> See T. Hobbes, *Leviathan*, ed. R. Tuck (Cambridge, 1996), p. 120 (Chapter 17).

<sup>45</sup> See G.W.F. Hegel, *Elements of the Philosophy of Right*, ed. A.W. Wood, trans. H.B. Nisbet (Cambridge, 1991), §258 Addition.

<sup>46</sup> Bradley, 'Some Remarks on Punishment', p. 278. See *ibid.*, p. 279.

<sup>47</sup> *Ibid.*, p. 274.

<sup>48</sup> *Ibid.*, p. 272.

<sup>49</sup> For example, see T. Brooks, 'T.H. Green's Theory of Punishment', *History of Political Thought*, 24 (2003), pp. 685–701; Bosanquet, *The Philosophical Theory of the State*, p. 216; Mackenzie, *A Manual of Ethics*, pp. 430–2; D.G. Ritchie, *Studies in Political and Social Ethics* (London, 1902), p. 221; and J. Seth, 'The Theory of Punishment', *International Journal of Ethics*, 2 (1892), p. 236.

demands it . . . where the good of the whole may call for moral surgery, mere innocence is certainly no exemption or safeguard.<sup>50</sup>

Bradley appears to distinguish what is moral best (i.e. the 'just') from what is permissible (i.e. the 'right'). It might be best if we never punish the innocent. The principle that punishing the deserving remains a good ideal we should aspire to fulfil. However, it is not an absolute condition for legitimate punishment.<sup>51</sup> If the welfare of the community in an extreme emergency demanded punishment of *undeserving* persons, then Bradley's theory of punishment appears to justify the punishment of the innocent even if it acknowledges its utmost reluctance to ever punish innocent people.

## V

Bradley's theory of punishment is universally held by virtually all commentators to be a *retributivist* theory of punishment. Some commentators argue this is true at least in *Ethical Studies*, if not in his work as a whole. This article strongly rejects this reading of Bradley.

I have demonstrated that Bradley does not defend a retributivist theory of punishment. Instead, he argues in favour of societal maintenance, not desert, as the primary justification of punishment within a two-tiered hybrid theory

<sup>50</sup> Bradley, 'Some Remarks on Punishment', p. 275. It may appear that when Bradley is speaking of 'removing' innocent people he is not equating 'removing' with 'punishing'. In the sentence following the passage cited above, Bradley says: 'We may doubt if such cutting-off without crime can fairly be called punishment, but, the thing being justified, I will not pause to consider the name. It is better to ignore a question which does not seem to affect our main result.' (*Ibid.*) This further explanation makes it very clear that Bradley endorses treating the innocent as if they were convicted criminals. He reminds us that under very specific circumstances — namely, in order to maintain the common good through 'moral surgery' — it is justifiable to subject the innocent to penal correction. Thus, I believe it is correct to claim that in this passage Bradley at least *appears* to confirm that his theory justifies the punishment of the innocent. That said, it is equally clear that Bradley literally 'ignores' the question of whether such treatment of the innocent is not merely 'removing' but 'punishment'. For this reason, my claim is only that he *appears* to justify the punishment of the innocent, as it is slightly ambiguous whether 'removing' is the same as 'punishment', strictly speaking. Unfortunately, Bradley does not say more here on this position. My most sincere thanks to David Boucher, Peter Nicholson, Colin Tyler and, most especially, James Connolly and an anonymous referee for pushing me on this issue.

<sup>51</sup> I believe that David Crossley is correct to say that 'the good of society comes first . . . We hope that such conflicts may not arise, thereby allowing us to serve both society's good and each individual's just treatment at all times'. However, I entirely reject his interpretation of Bradley's theory of punishment as a *utilitarian* theory of punishment. Bradley's aim is not to maximize pleasure and minimize pain, but societal maintenance within a certain framework, which is a strikingly different project. (See D. Crossley, 'Bradley's Utilitarian Theory of Punishment', *Ethics*, 86 (1976), pp. 200–13, esp. p. 207.)

where desert considerations are subordinate to the protection of the community's welfare. Where the demand to uphold societal maintenance conflicts with desert, Bradley sides with the former over the latter and, in so doing, accepts the legitimacy of punishing undeserving persons in emergency situations. Finally, it is equally clear that Bradley's views on punishment remain consistent between his *Ethical Studies* and his essay 'Some Remarks on Punishment'.

This article marks a fairly radical break from much of the work on Bradley's theory of punishment thus far. The question remains as to how commentators have gone astray. My best explanation is that early commentators, writing not long after *Ethical Studies*, incorrectly began propounding the view that Bradley defended retributivism and that this view has since become the received wisdom. In the absence of much work on Bradley's theory of punishment over the past few years, this conventional wisdom has gone unchallenged.

It is my hope then that this article offers a substantial contribution in overturning a misreading of Bradley that has been perpetuated unnoticed for too long. I doubt that my interpretation of Bradley's theory of punishment will make it more appealing to modern commentators given its stance on desert and the innocent. Nevertheless, beyond its greater textual accuracy, this article should make it clear that Bradley's theory of punishment is firmly in a tradition of Hegelian philosophers writing in the nineteenth century in its affirmation of societal maintenance as the primary justification of punishment.<sup>52</sup> Thus, the Bradley we find may be unfamiliar, but he is now far more consistent with the views of fellow British Idealists writing at his time.<sup>53</sup>

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<sup>52</sup> On Hegel's theory of punishment, see T. Brooks, *Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right* (Edinburgh, 2007), pp. 39–51.

<sup>53</sup> This is in keeping with the view that '[t]he British Idealists all hold essentially the same political philosophy', even if they each maintained significant differences. (See Nicholson, *The Political Philosophy of the British Idealists*, p. 4.)